Before a case comes within section 27 of the Evidence Ordinance such part of the statement as is admissible under that section should be proved to the Court. If it does not come within that section it should not be mentioned at all. The formula "In consequence of what the accused said I did so and so" is all wrong.

MAGISTRATE'S APPEAL.

David Marshall for the appellant.

A. V. Winslow (Crown Counsel) for the respondent.

Murray-Aynsley C.J. : — This was an ordinary case of being in possession of chandu. The offence took place in a sampan near a ship made fast to a wharf. The appellant was not a regular member of the crew of the sampan, but was said to be on board for the purposes of repairing the engine. His qualifications for doing so were not at all obvious.

The only part of the case which called for comment arose from the fact that the appellant, whilst in custody, made a statement and afterwards chandu was found very well concealed in the sampan. Before a case comes within section 27 of the Evidence Ordinance such part of the statement as is admissible under that section should be proved to the Court. If it does not come within that section it should not be mentioned at all. The formula "in consequence of what the accused said I did so and so" is all wrong and if I thought that the appellant had been prejudiced I would quash the conviction. I do not think that it could have done him any harm in the present case.

Appeal dismissed.

Solicitors for the appellant: *Battenberg & Talma.*

SEAH CHOON YONG & ANOR. v. REGINA.

[A. Cr. J. (Murray-Aynsley C.J.) May 19, 1954]

[Singapore — Magistrate's Appeals Nos. 41 & 43 of 1954]

Dangerous Drugs Ordinance, 1951, s. 6 — Protection of informers, s. 40 — Forfeiture of Car in which opium was found, s. 30 — Negligence no ground for forfeiture — Some degree of complicity of owner is necessary.

The first appellant Seah Choon Yong was the owner of the motor car in which opium was found; the second appellant Tay Kai Kee borrowed the car from the first appellant. The opium was found under the rear seat of the car in which the 2nd appellant was driving in company with another person who was not present at the trial. The second appellant was charged with being in possession of raw opium under section 6 of the Dangerous Drugs Ordinance, 1951.

Evidence by the 2nd appellant at the trial appeared to show that he had given information of the opium two days prior to the arrest to the detective who stopped the car and arrested the accused. The second appellant was convicted.

The first appellant (the owner of the car) was called upon to show cause why the car should not be forfeited in accordance with section 30 of the Ordinance. All knowledge that the car was to be used for the conveyance of opium was denied. It was also argued by counsel for the defence that even if the owner had knowledge of the fact that the 2nd appellant had informed the police, he was an informer in accordance with section 40 of the Ordinance, and that the car was used as a police trap to catch the criminals and therefore there was no *mens rea*. The forfeiture of the car was ordered. On these facts the 1st appellant appealed against the forfeiture. The accused (the second appellant) appealed against the conviction and sentence.

Held: from the evidence, the 2nd appellant appeared to have acted as a police informer before the offence was committed and that if his story was true he was guilty, if at all, in a purely technical sense and therefore the case should be sent back for a retrial. The decision on the forfeiture of the car must necessarily await the retrial of the whole case.

MAGISTRATE'S APPEAL.

Philip Hoalim Jr. for the 1st appellant.

A. V. Winslow (Crown Counsel) for the respondent.

Murray-Aynsley C.J. : — The facts of the case are peculiar. The appellant-accused was unrepresented. He did not cross-examine any witnesses but called as a witness a former police officer who had been called for the prosecution. From what this witness said it would appear that the appellant had acted as an informer before the offence was committed and drove the principal offender and his chandu at the direction of this police officer. I think that the matter should be cleared up. If the story is true the appellant was only guilty, if at all, in a purely technical sense.

As regards the order for forfeiture, I think that the learned District Judge misdirected himself. The relevant words are "knowledge, consent or connivance" and I consider that Seah Choon Yong was the owner for the purposes of the enquiry. I do not think that negligence is a ground for forfeiture unless there is knowledge, consent or connivance.

Retrial ordered.

Solicitors for 1st appellant: *Philip Hoalim & Co.*

TAN BOON SENG v. PUBLIC PROSECUTOR.

[A. Cr. J. (Storr J.) June 17, 1954]

[J. B. — Criminal Appeal No. 14 of 1954]

Road Traffic — Traffic (Restrictions on Use of Roads) Order 1953 reg. 3(c)(ii) — Charge of using vehicle with three or more axle weights which weight exceeds 5½ tons — Proof of correctness of weighing.

In this case the appellant was convicted on a charge under Regulation 3(c)(ii) of the Traffic (Restrictions on

Use of Roads) Order 1953 for using a motor vehicle with 3 axles which weight exceeds 5½ tons. Evidence was given by the Inspector of Weights and Measures, Johore, who said that he examined the weigh-bridge, used tc ascertain the axle weight of the vehicle in question, and found it to be correct. On appeal it was argued that the weigh-bridge was only meant to weigh vehicles of two axles and not of 3 axles, as in this case and that therefore the method of weighing and the unevenness of ground could not give a correct weight. It was further submitted that the onus of showing the correct weight was on the prosecution and as they had not done so, the learned Magistrate was wrong in calling upon the appellant for his defence.

Held: (1) the evidence adduced in this case as to the weigh-bridge was rightly accepted by the learned Magistrate as *prima facie* evidence of the correctness of any weight recorded by it; (2) bearing in mind that Regulation 3(c)(ii) of the Traffic (Restrictions on use of Roads) Order creates an absolute prohibition, the prosecution had made out a *prima facie* case which entitled the Magistrate to call on the accused for his defence.

Cases referred to:—

(1) *Sim Ah Man v. Public Prosecutor* (1949) M.L.J 21.

(2) *Prosser v. Richings* (1936) 2 All E.R. 1627.

(3) *Deputy Public Prosecutor v. Dollah bin Aziz* (1950) M.L.J. 250; (1950) M.L.R. 238.

(4) *Penny v. Nicholas* (1950) 2 All E.R. 89.

CRIMINAL APPEAL.

A. J. Braga for the appellant.

I. Talog Davies for the respondent.

Storr J. : — The appellant in this case was charged as follows :—

"That you on 4-6-53 at about 8.25 a.m. at Labis did use a motor vehicle No. J. 5776 with 3 axles, the central axle weight of which was found to be more than 5½ tons (i.e. 6 tons 13 cwts.) on a road within the State of Johore other than a road described in the Second Schedule to the Traffic (Restrictions on use of Roads) Order, 1953, and that you committed an offence under Regulation 3(c)(ii) of the Traffic (Restrictions on use of Roads) Order, 1953, vide Johore L.N. 28/53 and punishable under Regulation 78 of the Essential Regulations (B.M.A. G.N. No. 418 of 28-3-46)".

The evidence of the prosecution consisted of that of the Inspector of Weights and Measures, Johore, who gave evidence that on the 23rd June, 1953, he tested the weigh-bridge on which the centre axle weight of the lorry J. 5776 was ascertained and found to be 6 tons 13 cwts., instead of the weight allowed, i.e. 5½ tons, and found it to be correct.

Police Inspector Wilson Paul produced in evidence weigh-tickets (Ex. P1, P2 and P3) and weighing certificate (Ex. P4) which stated that the centre axle weight of the lorry was 6 tons 13 cwts., or 1 ton 3 cwts. in excess of the axle weight allowed by the regulation.

The learned Magistrate found that there was a *prima facie* case against the appellant and called on him for his defence. The appellant offered no defence and was convicted and fined $150 in default one month's imprisonment. It is from this conviction and sentence that the appellant has appealed.

Mr. Braga who appeared for the appellant in this appeal argued that there was no evidence that the weigh-bridge was accurate and that the weighing was correct. He referred to *Sim Ah Man v. Public Prosecutor*[1] and also I allowed him to refer to the evidence of Mr. Quince as an expert from Avery's Ltd., in Magistrate Case 191/51. His contention was that the weigh-bridge was only meant to weigh vehicles of 2 axles not 3 axles as in this case, and that therefore the method of weighing and the unevenness of the ground could not give a correct weight and that relying on *Sim Ah Man v. Public Prosecutor*[1] the onus of showing the correct weight was on the prosecution which, not having done so, had not proved the case beyond reasonable doubt and the learned Magistrate was wrong in calling upon the appellant for his defence.

The learned Deputy Public Prosecutor (Mr. I. Talog Davies) referred to the grounds of judgment of the learned Magistrate and referred to *Prosser v. Richings*[2] which was a somewhat similar case and in which the learned Chief Justice, Lord Hewart, after quoting regulation 59 of the Motor Vehicles (Construction and Use) Regulations, 1931, which reads :—

"The weight transmitted to the road surface by any one wheel of a motor car where no other wheel is in the same line transversely shall not exceed 4 tons and the weight so transmitted by any two wheels in line transversely shall not exceed, in the case of a vehicle with four wheels, 8 tons . . . . and the sum of the weights transmitted to the road surface by all the wheels of the heavy motor car shall not exceed, in the case of a vehicle with four wheels, 12 tons (and in other cases 19 tons and 22 tons respectively)"

stated :—

"There is no provision there with reference to the particular circumstances of any given highway, the amount of the camber or the gradient of a hill. The prohibition appears to be absolute."

The learned Deputy submitted that the regulation with the breach of which the appellant was charged was very similar. Regulation 3, after stating the roads on which vehicles of lesser weight might be used, reads :—

3(c)(ii) — "No vehicle with three or more axles whose gross weight exceeds 12 tons and whose axle weight exceeds 5½ tons shall be used on any other road within the State of Johore"

which was an absolute prohibition and it made no difference at all what the surface was when the axle weight was ascertained, axle weight being defined as :—

" 'Axle weight' means the weight transmitted to the road by any one axle of a vehicle, and for the purpose of ascertaining the axle weight the driver and any other person and any goods carried on such vehicle shall be included in the weighing thereof."

The learned Deputy also referred to the judgment of Thomson J. in Ipoh Criminal Appeal No. 33 of 1953 (not reported), *Deputy Public Prosecutor v. Dollah bin Aziz*[3] and *Penny v. Nicholas*[4].

Having considered the evidence given in the Court below, the judgment of the learned Magistrate and the arguments of Counsel before me in this appeal, I have come to the conclusion that the appellant was rightly convicted by the learned Magistrate of the offence with which he was charged. The evidence of the first prosecution witness, Ali bin Haji Hassan, Inspector of Weights and Measures, Johore, as to the weigh-bridge at Segamat Police Station, was rightly accepted by the learned Magistrate as *'prima facie'* evidence of the correctness of any weight recorded by same and in particular the weight of the centre axle recorded by Inspector Wilson Paul, the second prosecution witness. That being so and bearing in mind that regulation 3(c)(ii) was an absolute prohibition, the prosecution had made out a case which, if unrebutted, would warrant a conviction, and as the appellant refrained from entering upon his defence, he was rightly convicted. The questions raised in *Sim Ah Man v. Public Prosecutor*[1] in a case under regulation 3(c)(ii) do not arise, as stated by the learned Magistrate in his well reasoned judgment, as the regulation only refers to the 'axle weight' and not to the weight of the vehicle.

As to the sentence, I do not consider it is excessive.

The appeal is dismissed.

Appeal dismissed.

Solicitors for the appellant: *Braga & de Souza.*

SP. PONNIAH PILLAY v. SENTHAMARAI d/o VELLASAMY.

[O. C. J. (Buhagiar J.) March 20, 1954]

[Ipoh — Originating Summons No. 202 of 1953]

Guardianship of infant — Illegitimate child — Hindu law — Welfare of infant shall be primary consideration — Civil Law Enactment, 1937, s. 6(i) applied.

This was an originating summons in which the applicant applied for the custody of his infant child by the respondent. It appeared that the parties were of Indian nationality, of Hindu religion and that they were not legally married. Counsel for the applicant submitted that the matter in this case shall be governed by Hindu law and referred to the Hindu law on the subject of the custody of illegitimate children.

Held: (1) under s. 6(i) of the Civil Law Enactment, English law applied to cases relating to custody and control of infants but regard is to be had to the religion and customs of the parties, and such modifications are to be made as are necessary to prevent it from operating unjustly and oppressively; (2) the religion and customs of the parties cannot have the effect of ousting the principles of English law: they can only have the effect of modifying it, in so far only as may be necessary to fit the circumstances of each case; (3) according to the authorities on Hindu law it did not appear that the father of an illegitimate child has an absolute right to the custody of the child, but whatever his rights are, the primary consideration in cases of this nature should be the welfare of the infant; (4) in this case it is for the welfare of the child that the respondent should have the custody thereof.

Cases referred to:—

(1) *Ong Cheng Neo v. Yeap Cheah Neo & Ors.* L.R. 6 P.C. 381; 1 Ky. 326.

(2) *Choa Choon Neoh v. Spottiswoode* 1 Ky. 216.

(3) *Re Sinyak Rayoon & Anor.* 4 Ky. 329.

(4) *Mt. Parem Kaur & Ors. v. Banarsi Das* A.I.R. 1934 Lahore 1003.

(5) *Barbardo v. McHugh* (1891) A.C. 388.

(6) *In re O'Hara* (1900) 1 I.R. 232, 239.

(7) *In re Carrol* (1931) 1 K.B. 317.

(8) *Ex parte Knee* 1 B. & P.N.R. 148.

APPLICATION for custody of infant.

N. Sharma for the applicant.

A. R. H. Thomas for the respondent.

Cur. Adv. Vult.

Buhagiar J. : — In this Originating Summons adjourned for hearing in open Court SP. Ponniah Pillay is applying for the custody of his infant child, Murugappan, by the respondent, Senthamarai. It was admitted by the parties that they are of Indian nationality, of Hindu religion, and that they are not legally married. The affidavits of the applicant and the respondent show that they lived together from 1948 until the 12th August, 1953; the infant Murugappan, was born on the 29th March, 1949.

From the evidence on record it appears that for some time the respondent thought that she was lawfully married to the applicant according to Hindu rites and customs and that when she realised in August, 1953, that she was only his mistress she left him, and went to live with her sister, who is married to one Ramaiah and has three children. Attempts by the Arbitration Board (Indian Section), Social Welfare Department, Teluk Anson, to bring about a reconciliation were unsuccessful.

Some time in 1951 (about April) the applicant went to India with the respondent and the infant Murugappan. He was away for about four months; he married in India and returned to Malaya with his wife; there is now a daughter from this marriage.

The infant has been with the respondent's sister and brother-in-law for 3 or 4 years; the respondent used to take him to the applicant's house occasionally